IN THE

Supreme Court of the United States

October Term, 1951

No. 543

ON LEE,

Petitioner,

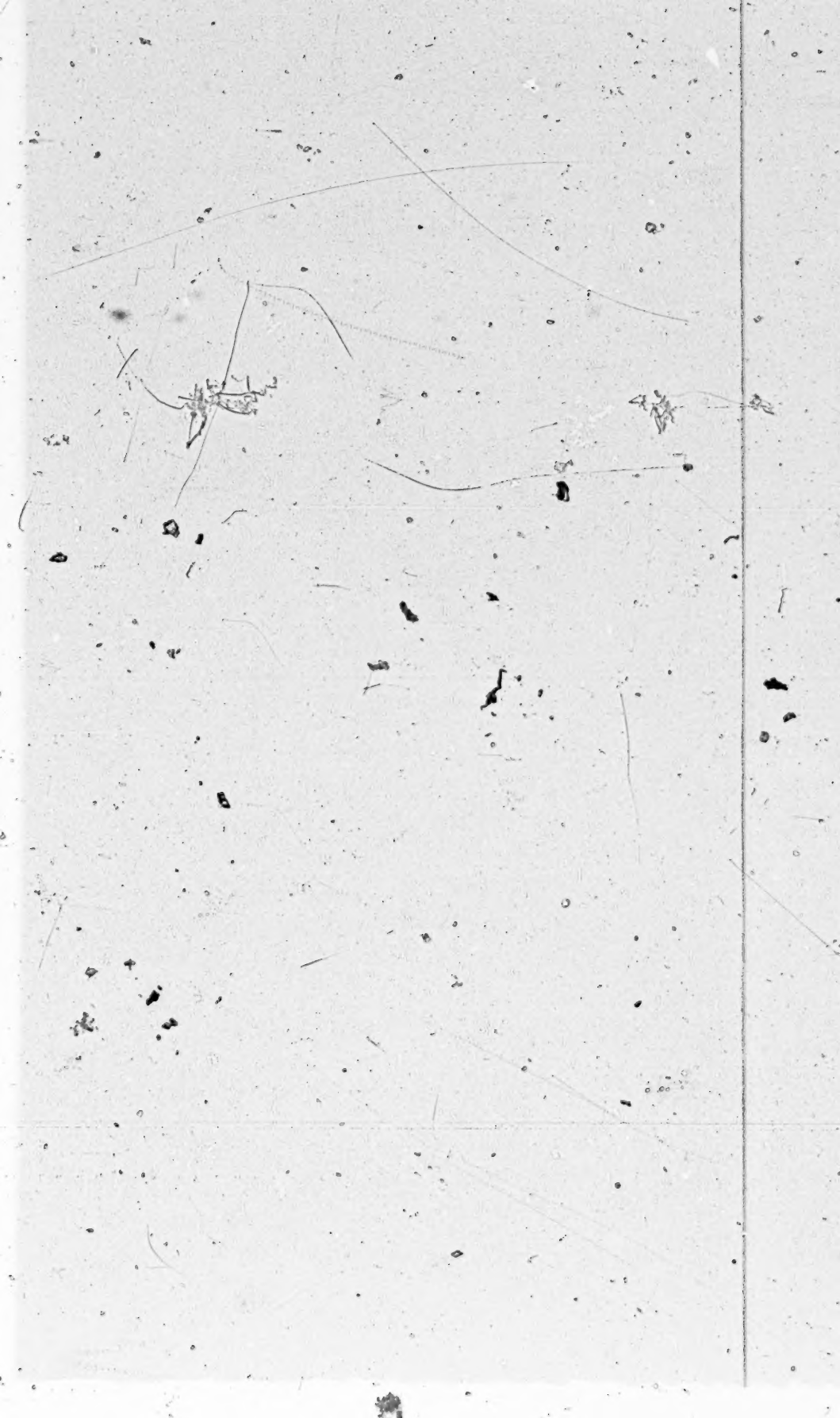
—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY K. CHAPMAN
GILBERT S. ROSENTHAL
Attorneys for Petitioner



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To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 21st, 1951, affirming a judgment of conviction in this criminal cause.

Opinions Below

There was no opinion in the District Court.

The affirmance in the United States Court of Appeals for the Second Circuit was by a divided court. Swan, *Ch. J.*, wrote the prevailing opinion in which Clark, *C.J.* concurred. Frank, *C.J.*, wrote the dissenting opinion. These opinions

have not as yet been reported, but are printed at the end of the within petition and a copy of same is also set forth at the end of the certified copy of the record submitted herewith.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 37 (b) of the Rules of Criminal Procedure and Title 28, §1254, United States Code.

Questions Presented

In the instant case, under a two count indictment[1] charging that the petitioner and a co-defendant, who pleaded guilty in the court below, unlawfully received, concealed and sold approximately one pound of opium on January 22nd, 1950, after the same had been imported and brought into the United States contrary to law[2] and that petitioner and his co-defendant together with others unknown to the Grand Jury unlawfully, wilfully and knowingly conspired to violate various statutes of the United States concerning traffic in narcotics[3] (R. pp. II-V) was it not prejudicial error to admit evidence of conversations allegedly held some six weeks after petitioner's arrest, between petitioner and a special employee of the Government, one Chin Poy, the conversations taking place in petitioner's combined home and place of business at Hoboken, New Jersey, Chin Poy having entered the premises by stealth and subterfuge and carrying concealed upon his person

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[1] Indictment is set forth at pp. II-V of Record.

[2] In violation of §§173 and 174, of Title 21, U. S. C.

[3] In violation of §371 of Title 18, U. S. C., conspiring to violate §§2553(a) and 2554 of Title 26, U. S. C.

a microphone and a miniature radio transmitter thus causing the conversations to be radioed to the world outside of petitioner's home and place of business where it could be picked up by a radio receiving set operated by a United States Treasury Department Narcotic Agent upon the same wave length as the transmitter (R. pp. 163-4), said agent being the only one who testified in respect to the alleged conversations, Chin Poy, the special employee who allegedly held the conversation with petitioner not being produced by the government in the Court below and no excuse or explanation being offered for his absence (R. p. 178), the Narcotic Agent's testimony being based upon alleged refreshing of his memory by the use of secondary evidence consisting of notes claimed to have been prepared by the absent special employee, Chin Poy, some time subsequent to the event (R. pp. 147-50). Should not this evidence have been excluded, having been obtained:

(a) In violation of petitioner's Constitutional Rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States?

(b) In violation of the provisions of Section 605 of Title 47 of the United States Code, the Federal Communications Act?

Should not this evidence also be ruled inadmissible by reason of the inherent power of this Court to formulate rules of evidence for Federal Criminal Trials, guided by the consideration of justice?

Objection to the admission of the said evidence was duly taken (R. p. 104).

Another question presented in the instant case is: was it not prejudicial error to admit evidence of accusatory

and incriminating admissions alleged to have been made by a co-defendant subsequent to arrest and in the presence of the petitioner, to which petitioner made no reply, said evidence being received by the trial judge on the theory that since the petitioner had not denied the statement he had, by his silence, admitted what was not denied (R. pp. 73-80, 102-8, 136, 137-9, 217, 219-222), particularly where it affirmatively appears in the Record in the instant case that subsequent to arrest and prior to the making of the alleged accusatory statement by the co-defendant, the petitioner had denied any connection between himself and the opium sold and delivered by the co-defendant to the federal narcotic agent? (R. pp. 53, 63). Objection to the admission of this evidence was taken timely (R. pp. 73, 4).

Was this error corrected by the erroneous charge of the trial court? (R. pp. 360-1).

Would the charge of the trial court, even if correct—which it was not in the instant case—correct and cure the harm done by the erroneous admission of this evidence coupled with long colloquy and discussion in and out of the presence of the trial jury?

Statutes Involved

Section 173, Title 21, United States Code:

> "173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.
>
> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to

be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe * * *."

Section 174, Title 21, United States Code:

"Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

"174. Same; penalty; evidence.—If any person fraudulently or knowingly imports or brings any narcotic drug into the United States, * * * contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years * * *."

Title 26, Section 2553(a), United States Code:

"§2553. Packages—(a) General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a), except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *."

Title 26, Section 2554(a), United States Code:

"§2554. Order forms—(a) General requirement.

It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

Title 18, Section 371, United States Code:

"§371 Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Reasons for Allowing Writ

The issues presented by the questions propounded *supra* have never been passed upon directly by this Honorable Court. This is the first known case presenting the question of the right of the Government to invade one's home and place of business using a radio device commonly known as a "walkie-talkie" radio set. The case presents the use of technical instruments unknown to man at the time of the decision by this Honorable Court in *Olmstead* v. *United States*, 277 U. S. 438. An extremely interesting, novel and important issue is raised for the first time as to whether

or not the use by Government employees of the shortwave radio set, introduced into a defendant's home by stealth and subterfuge, does not violate a defendant's constitutional guarantees granted him under the Fourth and Fifth Amendments of the Constitution, nor has there ever been any ruling by this Court on the issue of whether or not such use of a radio instrument is or is not in violation of the prohibitions contained within §605 of Title 47 U. S. C., the Federal Communications Act. In fact, so far as is known this is the first time either issue has ever been passed upon by any of the United States Courts of Appeal.

This case also presents another issue which has never been directly passed upon or considered by this Court since 1895. The admissibility of and the weight to be given a failure by a defendant after arrest to deny or affirm the accusatory statement made in his presence by a co-defendant after arrest. The last known case in which the issue was at all discussed by this Honorable Court was *Sparf & Hanson* v. *United States*, 156 U. S. 51, and even there the issue was not as clearly and squarely presented as it is in the instant case. The decisions of the various circuits are in conflict with each other.

It is also of great importance that a decision be given by this Honorable Court on the question of whether or not a Judge can be held to have cured an admittedly erroneous ruling during the trial on the question of admissibility of evidence particularly where lengthy and complete discussion and colloquy was had throughout the trial in the presence and hearing of the jury on the legal proposition presented and further particularly where the effort to correct by the Judge of the trial Court assumed a state of facts which were not in evidence.

The issues set forth above present, to say the least, extremely important questions of constiutional and federal

law; important to the general public and the Bench and the Bar. Until these questions have been passed and ruled upon by this Honorable Court no trial Court or Court of Appeals can feel reasonably certain and secure that the rulings made by it upon the issues presented are truly the law of the land.

Statement

Benny Gim, a former agent of the Bureau of Narcotics, attached to the office in New York City, stated that he was introduced to the co-defendant, Gong Len Ying, on January 22nd, 1950, and that upon the first introduction he conversed with him concerning the purchase of opium (R. p. 4). After extended conversation and bickering concerning price, a deal was arranged. He met Gong at the appointed place and time, paid to him $550.00 whereupon Gong left him and returned shortly thereafter with a package containing a pound of crude opium (R. p. 7). Subsequently he met Gong on February 2nd and had a conversation concerning his possible purchase of twenty pounds of opium and again met him at 10:30 on the same evening. He next saw Gong February 9th, 1950, and Gong stated that he could have the opium for him on February 12th and they made an appointment. He met Gong as agreed and was to return at 1:30. A price was agreed of $500.00 per pound. On the second meeting on that day Gong insisted on receiving the cash before delivery of the opium and an argument ensued between them as to which should be given up first, the money or the opium. Gong left him on three occasions, went across the street and on each occasion returned in five or ten minutes and remained adamant in his demands for the cash before delivery and

after the third such trip Agent GIM gave a previously arranged signal for Gong's arrest (R. p. 18).

Upon cross-examination he testified that on his very first meeting with Gong he had dickered with him concerning the price and Gong made the price and promised delivery without consultation with anyone else. That although a sale had taken place and Gong had received marked money, no effort was made to arrest Gong on January 22nd (R. pp. 31-34).

That he never saw the petitioner with Gong and that the first time he saw petitioner was when he was brought into Police Headquarters on February 12th at about 3 o'clock in the afternoon (R. pp. 51-2). He further testified that petitioner was questioned in his presence concerning the pound of opium that Gong had sold January 22nd, 1950 and petitioner denied ever having given or sold it to Gong (R. p. 53) or having any dealings with opium (R. p. 63).

Ellsworth Monahan, a detective of the Police Department of the City of New York assigned to the Narcotic Squad, was called by the Government. He stated that he had seen Agent Gim and Gong together on January 22nd, 1950 (R. p. 64) and later saw petitioner and Gong come out of 15 Mott Street and go to 79 Mott Street together, and that after about twenty minutes Gong left and kept his appointment with Gim and petitioner left and walked in a different direction. Upon questioning by the Court he stated that he never saw petitioner have or handle a package (R. p. 68). He also testified corroborating Agent Gim's version of the various meetings with Gong, and that upon a signal from Agent Gim he and other police officers and narcotic agents arrested both Gong and petitioner (R. pp.

72-3). That he questioned them and the Federal Agents questioned them in Chinese and petitioner denied having any transactions with Gong (R. p. 73). That when they eventually got to the office of the Federal Narcotic Bureau, he for the first time questioned Gong in the presence and hearing of petitioner and asked him where he had obtained the opium that he sold to Agent Gim on January 22nd. Over the objection and exception of counsel the Court elicited the conversation alleged to have been had with the co-defendant Gong by Officer Monahan subsequent to arrest and after he had received a denial of any connection in the transaction by petitioner. He was permitted to testify that Gong stated that he had received the opium from the petitioner in the hallway of 79 Mott Street on January 22nd and that petitioner said nothing in response to this statement by the co-defendant (R. pp. 73-75). Counsel for petitioner immediately asked the Trial Court for a direction to the jury to disregard this conversation and a lengthy colloquy took place between the Court and counsel for petitioner in the presence and hearing of the jury, the Court going so far as to state during this colloquy:

> "Now I will say is it a principle of Law that if a man hears some accusation made against him and he doesn't reply, is that evidence against him? * * *
>
> The Court: I understand from the witness—correct me if I don't state the testimony properly—the defendant was first asked and he said he never sold any opium or had anything to do with it. Then in his presence the other man says he got it from him. Is the fact that he didn't reply evidence against him?
>
> Mr. Rosenthal: No, your Honor.
>
> The Court: I think it may well be. I am not speaking about conspiracy" (R. p. 76).

The District Attorney also injected himself into this discussion and in the presence and hearing of the jury offered the following proposition of law:

> "Mr. Martin: It is a matter for the jury to consider.
>
> The Court: What is that?
>
> Mr. Martin: I submit it is a matter for the jury to consider why he did not contradict" (R. p. 77).

The entire discussion on this question of evidence when it was first raised during the trial appears at pages 73 to 80 of the Record. This subject matter will be discussed at greater length in petitioner's Brief herein, at which time there will be set forth the various times and places where the discussion arose during the trial.

Upon cross-examination Detective Monahan stated that after the arrest petitioner was searched. He had a normal amount of money upon him and that his money was compared with the serial numbers of the money alleged to have been used on January 22nd and not found to coincide with same (R. p. 88). He also testified that the appellant was questioned extensively by him in English and by the Agents in Chinese and English and that he always denied having any dealings with the co-defendant Gong in respect to the pound of opium alleged to have been sold on January 22nd (R. p. 90).

Lawrence J. Lee, a Narcotic Agent, like both of the preceding witnesses stated that petitioner at all times denied any part in the transaction of January 22nd had between Agent Gim and the co-defendant Gong (R. pp. 102-3).

Over the objection of counsel Agent Lee was permitted to testify to several conversations which he received on a

radio, carried by him, and which were broadcast on March 30th and subsequent dates, the exact dates not being clear in the Record, by one Chin Poy, a Government informer, and petitioner. The substance of these broadcasts was Chin Poy attempted to obtain an admission from petitioner concerning the transactions had between Gong and Gim, and that the petitioner had broadcast by radio that the opium in question did not belong to him, it belonged to a syndicate of which he was merely the representative (R. pp. 104-5). He was also permitted to testify that the appellant was supposed to have told the informer Chin Poy in the broadcast that he was the representative of a syndicate.

Upon cross-examination Agent Lee testified that he never made any notes at the time he claimed to have been receiving the various broadcasts, that he was testifying purely from memory refreshed by alleged writings of Chin Poy, nor was any recording device used. That he did attempt to use a recording device of Chin Poy's conversation but the device was not working (R. pp. 109-10, 196-7).

He stated that he knew the petitioner to be a member of the "Eng" family and that this group had its headquarters at 15 Mott Street (R. p. 154). Further cross-examination developed that Agent Lee and a city detective had gone with petitioner to 79 Mott Street where they tried the keys, found upon the petitioner, on the various doors of the apartments at that address, but that none of them fit (R. p. 169). The witness stated Chin Poy, the informer, was not in court and had not been during the trial, and no explanation was given for his absence from court (R. pp. 175-8). He testified to the effect that while he was in Hoboken allegedly receiving broadcasts of the conversation between Chin Poy and petitioner on two occasions, he

stood in the vestibule of an apartment house on the same block, with the radio attached to his car and the set in a briefcase. The witness stated that on February 13th he went to the two places of business conducted by petitioner in Hoboken and searched the premises plus a safe in one of them, and found no evidence of any narcotics, nor was any of the money found therein part of the marked money given to Gong on January 29th (R. pp. 192-4).

The co-defendant, Gong Len Ying, testified in behalf of the Government with Narcotic Agent Lee acting as interpreter. He said he was in the delivery business and that he knew petitioner for about two years (R. p. 200). That he had pleaded guilty to the Indictment herein (R. p. 203) and that the pound of opium he had sold to Agent Gim on January 22nd, 1950, had been obtained by him from On Lee, at 79 Mott Street (R. p. 204). That he was not certain of the amount received by him for the opium and had given all that he had received, except $70.00, to the petitioner, keeping $70.00 for his share of the transaction (R. pp. 204-5). When he met Gim on February 12th, Gim told him he wanted to buy twenty pounds of opium and Gong informed Gim he would try and get it. That he called up petitioner who stated he did not know whether he had any opium, but that he would see and that he asked petitioner to come to Chinatown (R. pp. 213-15). That he met petitioner at 15 Mott Street and went in and had tea with him and that when he asked petitioner about getting twenty pounds of opium petitioner stated that if there was any money they would talk. He claimed he repeated this to Agent Gim. He said he went back and forth between Agent Gim and the petitioner three times, he received no money or opium and he and petitioner were placed under arrest (R. p. 218). Again over the objection and exception of counsel, the

District Attorney attempted to elicit the fact that the co-defendant, Gong, had made an admission of guilt implicating the appellant in the presence and hearing of the petitioner without any denial on the part of the petitioner (R. pp. 217-21). He also testified under cross-examination that he had definitely told Agent Gim that if he received money from him he could definitely deliver twenty pounds of opium (R. p. 235).

Arthur Compton was called as a character witness for the petitioner. He testified he resided at 1225 Washington Street, Hoboken, New Jersey, and was retired, having been assistant manager of the D. L. & W. Railroad, marine division. That petitioner's laundry is right across the street from him and that he had known him for five or six years and that his reputation was excellent. Cross-examination developed that he had discussed his reputation with many people including the petitioner's landlord and that everyone spoke well of the petitioner (R. pp. 234-41).

Eng See Git was called as a character witness for the petitioner. He stated he had known petitioner for about fifteen years and knew a lot of Chinese people who knew him and that the appellant had an excellent reputation and good character (R. pp. 242-43).

Elsie Lee, wife of the petitioner, called as a witness in his behalf stated they were married June 12th, 1917, in San Francisco. Their Marriage License was introduced into evidence as Defendant's Exhibit "C" (R. p. 259), that they had lived in Hoboken for about twenty years and that they had one son 22 years of age. That they owned two laundries in Hoboken she operating the one at 105 Tenth Street and her husband operating the one at 1222 Washington Street, and that their usual hours of work

were from nine in the morning till about twelve at night (R. p. 260). That she knew the co-defendant Gong and for about three years he had sold Chinese food and vegetables to her and her husband. That she had discontinued dealing with him in September 1949 because he tried to make advances to her, invited her to shows, beaches, etc., and showed her large sums of money and told her he would like to marry her. She never told her husband anything concerning this as she was afraid it would start a fight (R. p. 262).

On Lee, the petitioner, took the stand in his own behalf. He stated he was born in the United States with the name of Chu Chee under which name he was both married and registered under the draft, his draft registration being introduced into evidence as Defendant's Exhibit "D". He stated he used the name On Lee for business purposes (R. p. 266). That he worked about fifteen hours a day in his laundry. That he was 61 or 62 years of age and had never previously been arrested or convicted of any crime. That he knew the co-defendant Gong and had bought food and supplies from him (R. p. 267). That some time in January Gong had told him he knew of a wet wash laundry for sale in Newark and would arrange an appointment for him to meet the owner on the following Sunday in Chinatown and that is when he saw Gong on January 22nd, 1950. That he met him at 15 Mott Street, the rooms of his family association, and had gone with him to 79 Mott Street, at Gong's request, to an apartment in that building, what floor he did not recall (R. pp. 268-9). That there were some men playing mahjong and that Gong left him for a while and went into some other room looking for the wetwash owner. That the petitioner kibitzed the mahjong game and Gong left before he did (R. p. 271). That he never gave

or sold to Gong a pound of opium or any opium. He stated he had one time written his telephone number so that Gong could call him when he met the wetwash owner in New York and that his telephone had an extension in both laundries in Hoboken so that if anybody spoke to him while he was in Washington Street anyone else could have listened in on the conversation at Tenth Street (R. pp. 271-2). He denied ever having dealt in opium in any form and the Court asked him had he ever smoked it to which he replied:

"Never! I hate it" (R. p. 272).

He received a phone call on the day of his arrest, February 12th, 1950, from Gong, who told him that if he came over to New York right away he would be able to meet the owner of the wetwash which was for sale. That he met Gong two or three times in about ten minute intervals, but Gong never returned with the wetwash owner. That when they left the premises Gong informed him he would try once more to find the man and while petitioner was waiting for him on the sidewalk, he was arrested. He denied ever having discussed with Gong the purchase or sale of ten or twenty pounds of opium or any opium (R. p. 274). That he was questioned by City detectives and the Agents concerning opium and he informed them that he had none, that the officers accused him of selling opium with Gong and he denied it (R. p. 276).

He admitted knowing Chin Poy for about 16 years and that Chin Poy came to see him after his arrest. The Court, over the objection of the attorney for the petitioner, permitted the District Attorney to read various questions and answers to the appellant concerning the conversation allegedly had with Chin Poy, and broadcast by radio, which

questions and answers he denied. The District Attorney was also permitted to ask questions concerning an alleged proposed future criminal transaction with Chin Poy (R. pp. 292-99).

POINT I

The receipt of the testimony of Agent Lee concerning conversations between Chin Poy and petitioner allegedly overheard by means of the use of a radio transmitter operated by Chin Poy and a radio receiver operated by Agent Lee was error prejudicial to the petitioner.

Over the objection of counsel, federal narcotic agent Lee was permitted to testify to the receipt by radio of radio broadcasts of conversations alleged to have been had between Chin Poy, a special Government employee, and the petitioner (R. p. 104). This testimony was objectionable and highly prejudicial to the petitioner and should have been excluded for three reasons which are discussed at length hereinafter.

This issue and question has never been previously ruled upon by the Supreme Court and the importance of the question involved is shown by the opening paragraph of the dissenting opinion of Frank, *C.J.*[4]

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[4] "1: Sixty-five years ago, the case of a humble Chinese laundryman led to a decision involving the formulation of one of the most important constitutional principles. Today On Lee's case, as I see it, presents the violation of one of the most cherished constitutional rights, one which contributes substantially to the distinctive flavor of our democracy." Case referred to: *Yick Wo* v. *Hopkins* (118 U. S. 356). (R. p. 414)

(a) The evidence of the alleged conversations between Chin Poy, Government Special Employee, and the petitioner, allegedly overheard by operation of shortwave radio was inadmissible having been obtained in violation of petitioner's constitutional guarantee against illegal search and seizure granted him under the Fourth Amendment of the Constitution of the United States and in violation of his right against self-incrimination granted him under the Fifth Amendment of the Constitution of the United States.

This question has been explored at great length in the dissenting opinion of Frank, *C.J.*, in the instant case (R. pp. 414-28). The issue has been discussed so fully and lucidly by Judge Frank that it is with extreme difficulty at this time that petitioner's counsel restrains himself from offering the said dissenting opinion as petitioner's Brief herein and attempts to enlarge upon same. In the instant case it appears that Chin Poy, a stool pigeon, described in the Record by narcotic agent Lee with the euphemism, "special employee" of the Government, went to the combination home and place of business of the petitioner in Hoboken, New Jersey, this being a chinese hand laundry with the store portion in the front of the premises and living quarters in the back rooms of the said premises, and engaged petitioner in conversation. Chin Poy was carrying, according to the testimony of Agent Lee, concealed upon his person, a microphone and radio transmitting equipment (R. pp. 103-4). Nartcotic Agent Lee stationed himself in the vestibule of a building about four doors removed from the petitioner's premises and by means of a radio receiving set working on the same wave length as the transmitter concealed upon the person of Chin Poy, heard, according to his testimony, the conversation alleged to have been had between Chin Poy and the petitioner Agent Lee testified that his receiving set was

concealed in a briefcase which he rested upon a radiator in the aforementioned vestibule and that he had in his ear a crystal device which enabled him to hear the broadcast from his aforementioned receiving set.

He was permitted, over the objection of petitioner's trial counsel (R. p. 104) to testify to the conversation he claimed to have heard between Chin Poy and the petitioner on March 30, 1950, approximately six weeks after petitioner's arrest on February 12th, 1950. His testimony was based upon alleged refreshing of his recollection by notes claimed to have been made by Chin Poy (R. pp. 110-12, 117-18, 120). At one point Agent Lee stated he had lost his own original notes (R. pp. 118, 120-1) and at another point that he had misplaced them (R. pp. 186-7). No excuse or explanation was offered for the failure of the Government to produce Chin Poy at the trial (R. pp. 175-8). Agent Lee testified he attempted to use a recording device to record the conversation between the petitioner and Chin Poy, but the device was not in working order (R. pp. 109-10, 196-7). Petitioner testified that he had known Chin Poy for a number of years, he having been a former employee of petitioner, and that when Chin Poy called at his premises on or about March 30th, he had ordered him therefrom. He denied having any conversation with the said Chin Poy in respect to the facts of the instant case (R. p. 300).

It is the contention of the petitioner herein and it is respectfully submitted in his behalf, that the entry of the Government special employee upon the combined residence and business premises of the petitioner was a trespass and constituted an unreasonable and illegal search and seizure in violation of the guarantees contained within the Fourth Amendment, and the evidence thus obtained was inad-

missible in view of the guarantees contained within the Fifth Amendment.

The prevailing opinion of Swan, *Ch. J.*, in the Court of Appeals below, went upon the theory that this evidence was admissible being similar to that obtained by a federal employee entering the premises of a defendant by subterfuge only and thereafter being permitted to testify concerning statements overheard or that are made to him while upon the premises (R. p. 410). There might be merit to this position and theory if the Government had produced the party who had entered petitioner's premises by subterfuge, namely, the Government employee Chin Poy, although even under such circumstances it is the petitioner's contention such evidence would not be admissible.

Be that as it may, the fact is that we are not here concerned with the testimony of Chin Poy, he never having been produced in Court nor any explanation given for his absence. The issue clearly presents itself as to whether or not the evidence allegedly obtained by the combination of a Government employee by fraud and by subterfuge entering petitioner's home and place of business and by the use of a radio transmitter and receiving set so that the evidence, if any, obtained by this special employee would be broadcast from the premises to the world and more particularly to another Government employee, federal narcotic agent Lee, should have been admitted into evidence and is a proper means of gathering evidence by federal employees. In the case of *Gouled* v. *United States*, 255 U. S. 298,[5] this Court had occasion to specifically rule

[5] In that case a federal employee entered the office of a friend, who was suspected of crime, and while there under the pretense of paying a friendly visit surreptitiously extracted and removed certain papers from the defendant's desk.

and pass upon the question of the admission into evidence, of evidence obtained surreptitiously and by fraud on the part of a Government witness and in that case it was distinctly held that such evidence was obtained by means of an unreasonable search and seizure in violation of the Fourth Amendment and the admission of the papers was a violation of the Fifth Amendment.

The prevailing opinion in the appellate Court below makes much of the fact that the majority opinion of *Olmstead* v. *United States*, 277 U. S. 438, has never been directly questioned or overruled by this Court. It does, however, admit that in *Goldman* v. *United States*, 316 U. S. 129, 134, this Court, by dicta, indicated that if the dictaphone which had been placed in the office of one of the defendants by trespass had worked and had been the means of gathering the evidence offered by the Government, such evidence would have been inadmissible.

Where can you find a more clear cut instance of evidence being obtained by trespass than in the instant case? Here we have Chin Poy, with a radio transmitter concealed upon his person in the premises of the petitioner. In the *Goldman* case we had a dictaphone physically placed upon the premises. In both cases we had a direct crossing of the threshold of the defendant by Government employees armed with instruments that would cause and permit other Government employees to, for all practical purposes, to accomplish the same as if they had secreted themselves physically upon the premises of the defendant.

Even if this Court were to hold at present that there was no disposition on their part to overrule the decision in *Olmstead* v. *United States*, cited *supra*, the distinction between the instant case and the *Olmstead* case is so marked that a ruling might well be made here in favor of peti-

tioner without destroying the effect of or specifically overruling the Olmstead decision.

Chief Justice Taft in his opinion took occasion at five specific instances to point out there had been no intrusion, invasion, or trespass upon the physical premises of the defendant. He took pains to set this forth at page 457 of his opinion,[6] at the top of 464[7] of his opinion in discussing *Gouled* v. *United States* (cited *supra*), at the bottome of page 464,[8] and twice on page 466.[9]

The Courts of this country and particularly this Honorable Court, have repeatedly found it necessary to curtail the activities of law enforcement agencies and particularly the means and methods used to gather evidence. In fact, in *United States* v. *Trupiano*, 334 U. S. 369, a case cited and approved in the majority opinion in the Court of Appeals below, this Court took great pains to point out that it was still necessary for the Courts to lay down and enforce the rules concerning the gathering of evidence.[10]

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6 "The insertions were made without trespass upon any property of the defendants * * * the taps from house lines were made in the streets near the houses".

7 "There was actual entrance into the private quarters of defendant". Referring to *Gouled* v. *United States*.

8 "There was no entry of the houses or offices of the defendants".

9 "Here those who intercepted the projected voices were not in the house of either party to the conversation"
"* * * or an actual physical invasion of his house, or 'curtilage' for the purpose of making a seizure."

10 This Court said at 705:
"In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed".
Petitioner submits that in his case it is highly significant that the evidence complained of was not obtained under the circum-

The decisions of this Court and the Court below are replete with the fact that no distinction is to be made between search and seizure of a home or of a man's place of business.[11]

Chief Justice Swan's opinion below makes much of the fact that there was nothing tangible seized or obtained in the instant case and urges that the Fourth Amendment of the Constitution intended solely to provide for the search of a place or the person and the seizure of tangible things. This argument is particularly disturbing and unappealing to a practicing lawyer or doctor since all people engaged in the professions have, at some time or other, and unfortunately all too often, "had their brains picked", by a perfectly respectable friend or acquaintance. This friend or acquaintance would never give thought, secretly or publicly, to picking the pocket of anyone or stealing the wares of a merchant, but often has not hesitated to steal and take the stock in trade of his professional friend or acquaintance by seeking and obtaining advice with no intent to pay for same. Who can say that the ideas of a

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stances outlined in the Trupiano, there being no "excitement of the capture" of a suspected person. The petitioner complains of acts of the Government's agents taking place over 6 weeks after the arrest of the petitioner and being committed with deliberation and in apparent desire to bolster what must have appeared to even the most biased federal employee to be, to say the least, an extremely weak and unsustainable case against the petitioner. Continuing, this Court said in the *Trupiano* case:

"To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible and subsequent history has confirmed their wisdom of that requirement."

11 *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385;
Gouled v. *United States*, cited *supra*;
Go Bart Co. v. *United States*, 282 U. S. 344;
United States v. *Lefkowitz*, 285 U. S. 452.

man or his words and every thought are not his secret property the same as his watch, pocketbook or papers. If we were to carry this to its logical conclusion it can be conceived that a Government agent under the circumstances and conditions existing in the instant case, might carry on a conversation with a mute who could not answer but would write out his replies and then we would have federal narcotic Agent Lee testifying to what he heard over the radio, namely the question or statements propounded by Chin Poy and producing and introducing into evidence the written replies made and given to Chin Poy by the mute. Can one say that under such circumstances that it would be permissible for Agent Lee to testify as to the oral statements made by Chin Poy, but that the written replies would be inadmissible into evidence because it was obtained by illegal search and seizure and something tangible or physical had been carried away as a result of that illegal search and seizure. Suppose one called at the office of a friend who had in his house a wire recording or dictaphone recording device, and that this device was secretly placed in operation by the caller while a conversation was being held between the two and that the caller then surreptitiously purloined the reel of wire or the record cut by the dictaphone. Would this evidence be inadmissible because the physical evidence of the spoken word had been obtained in violation of the Fourth Amendment or should it not be rejected from evidence because the very spoken word itself had been obtained in violation of the Fourth Amendment.

The prevailing opinion below cites with approval the case of *Davis* v. *United States,* 378 U. S. 582 as authority for the admissibility of evidence if obtained by subterfuge. A careful reading of this decision discloses that there was

no subterfuge on the part of the Government agents and the evidence obtained was due to the invitation of the defendant to any and all persons including the general public to join with him in breaking the Law of the United States. The case of *United States* v. *Trupiano* (cited *supra*), is also cited in the prevailing opinion for authority that subterfuge is not a trespass. The distinctions between these cases and the instant case are so clearly set forth in the dissenting opinion of Frank, *C.J.* (R. p. 425), that to belabor them further in this Brief would serve no purpose.

This Court only recently condemned surreptitious entry into a premises. In *United States* v. *Jesse Jeffers Jr.*, decided November 13th, 1951 (no official citation as yet) the prevailing opinion of the Court said in discussing the entry by officers to make a search for the sole purpose of seizing contraband:

> "* * * the officers not only proceeded without a warrant or other legal authority, but their intrusion was conducted *surreptitiously* and by means denounced as criminal." (Emphasis supplied.)[12]

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[12] A very interesting theory is presented by footnote 7 of the dissenting opinion of Murphy *J.* in *Goldman* v. *United States*, 316 U. S. 129 at 140:

> "A warrant can be devised which would permit the use of a detectaphone, cf. Article 1 §12 of the New York Constitution (1938). And while a search warrant with its procedural safeguards has generally been regarded as prerequisite to the reasonableness of a search in those areas of essential privacy, such as the home, to which the Fourth Amendment applies (see *Agnello* v. *United States*, 269 U. S. 20, 32) some method of responsible supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusion by Government officers. (See Wigmore, Evidence, 3rd Ed. Vol. 8, §2184b, pp. 51-2.)

If the ruling in the instant case is permitted to stand no one will be safe in talking to a friend, acquaintance or business associate, no matter where such conversation might take place and particularly if it takes place within his home or place of business, unless and until he has conducted a thorough and complete investigation and search of the person of the party with whom he is conducting the conversation, or in police parlance, he has "frisked" the individual. If because of modern science we are to live under the constant threat of having our words and very thoughts broadcast to the world or to individuals we do not even know, then our theory of the inherent right of every member of our society in these United States to liberty becomes a mockery and travesty and mere cant. Several years ago, the exact title of the case involved escaping the writer, but the name of the attorney involved being well known to the writer and members of the Bar of the City and State of New York and even the United States, a well known and eminently respectable member of the Bar of the City and State of New York went to California on a combined honeymoon and business trip. The business concerned negotiations of a possible settlement of a dispute involving large sums of money and concerned with an oil company. Agents of the opposition sank so low as to secrete in the honeymoon boudoir, immediately beneath the bed of this attorney and his wife, a dictaphone connected to a recording device placed elsewhere so that not only did they record and obtain any and all business conversations held within the bedroom, but also the intimate details of the honeymoon of this man and wife. If memory serves me correctly prosecution was had and conviction obtained of the parties committing this foul and low form of spying.

Judicial approval of the conduct of the federal employees in the instant case can only produce repeated and worse offenses of this nature.

The dissenting opinion of Frank, *C.J.*, quotes at length from Orwell's "1984" and also cites references at length to the conditions existing within Nazi Germany when and where society had what is tantamount to thought control. The actions of the Government agents and employees in this case is what we hear as now occurring in those Countries beyond the "Iron Curtain" and certainly do not conform to the concepts within this Country of those

> "certain inalienable rights, that among these are life, liberty and the pursuit of happiness",

with which the second paragraph of our Declaration of Independence informs the world all men are endowed.

In *Neuslein* v. *District of Columbia*, 115 Fed. (2d) 699, Chief Justice Vinson, then a Circuit Judge, writing the prevailing opinion of the Court of Appeals for the District of Columbia held that where police officers trespassed by entering the home of the defendant and while upon the said premises obtained certain evidence through their power of observation and hearing while questioning the defendant, they had, in his opinion, conducted an illegal search and seizure. He said in part,

> "The crucial thing 'found' in this 'search', was a declaration of fact by the defendant that has become decidedly incriminating. * * * The Fourth and Fifth Amendments relate to different issues, but cases can present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by

unlawfully coming into his home and by placing him in custody. * * * But how did the officers find themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right."

The prevailing opinion in the Court of Appeals attempts to distinguish the instant case from the *Neuslein* case because of the fact that here the entry was through subterfuge and there it was a direct trespass. In view of the decision in the *Gouled* v. *United States* and *United States* v. *Jesse Jeffers Jr.*, both cited *supra*, it is respectfully submitted that there is no distinction between entrance made through trespass or by fraud and subterfuge and that in either or both cases a trespass in violation of the Fourth Amendment is committed.

(b) The evidence of the conversations between Chin Poy and petitioner having been obtained by means and use of radio were obtained in violation of §605, Title 47 U. S. C. and, therefore, inadmissible.

Prior to the decision in *Olmstead* v. *United States*, there was upon the Statute books a Law commonly known as "The Radio Act".[13] Subsequent to the decision in *Olmstead*

[13] Chapter 169, §27, Laws of 1927:

No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception to any person other than the addressee, his agent or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination or to proper accounting or distributing offices of the various communication centers over which the radio communication may be passed, or to a master of a ship under whom he is serving, or in response to a Subpoena issued by a Court of competent jurisdiction, or on demand of

v. *United States* and its ruling that the tapping of telephone wires and obtaining the conversations was legal and the evidence thus obtained admissible and not in violation of the Fourth Amendment, Congress passed what is known as the Federal Communications Act and by §605 of Title 47 U. S. C. made the interception or disclosure of messages transmitted by radio, telephone, or telegraph, illegal.[14]

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other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof and knowing that such information was so obtained shall divulge or publish the contents, substance, purport, effect, or meaning thereof, or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; provided that this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

14 §605. Unauthorized publication or use of communications:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted

The Federal Communications Act closely parallels and incorporates most of the provisions of the former Radio Act. The prevailing opinion of the Court below dismissed as not sustainable the contention that the disclosure of the evidence overheard by means of radio by Agent Lee was forbidden by the Federal Communications Act. It quoted from the decision of this Court in *Goldman* v. *United States*, cited *supra*[15] and the Court found that there was no "interception" of a communication, the radio being used merely as a mechanical means of eavesdropping. By the very natuure of radio you have a different condition presented in respect to interception than exists in telephone or telegraph wires. There cannot be and there is not in an interception of a radio broadcast by the introduction of any mechanical device between the point of transmission and the point of interception. The very use of the transmitted causes the conversation to be broadcast upon the ether waves and anyone with a receiving set tuned to the

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communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, ch. 652, §605, 48 Stat. 1103.)

[15] The protection intended and afforded by the Statute is of the means of communication and not of the secrecy of the conversation (316 U. S. 129, 133).

same wave length as the transmitter will receive the message even though it also is received at some other point by the intended recipient. The Radio Act and the Federal Communications Act both provide that no person shall either receive or use any information contained within a message for his own benefit or for the benefit of another not entitled thereto or having become acquainted with the contents of any message, divulge the same without the consent of the senders. In the instant case the petitioner never wittingly or knowingly broadcasted to Agent Lee so that it cannot be contended that federal narcotic Agent Lee was a proper recipient of any radio message from the petitioner nor did the petitioner at any time consent to the disclosure by Agent Lee of his broadcast and while it is probably properly assumed that Chin Poy did so consent by the very use of the transmitter.[16] There is here, as was pointed out by the Circuit Court of Appeals for the Second Circuit, in the case of *United States* v. *Polakoff*, 112 Fed. (2d) 888, two senders and, therefore, interception or disclosure of the broadcast without the consent of the petitioner could not be held to be authorized under the exceptions contained within the Federal Communications Act.

(c) The inherent power of this Honorable Court to formulate rules of evidence in federal criminal trials guided by consideration of justice should cause the rejection of evidence obtained in the manner and by the devices used in the obtaining of evidence of the conversations had by Chin Poy and the petitioner.

This Court has ruled in *McNabb* v. *United States*, 318 U. S. 332 that in the interest of justice this Court can and

[16] The Record is barren of any statement as to his consent.

should reject evidence improperly obtained by Federal officers, the Court stated at 341:

> "The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those tried solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal Courts, see Nardone v. United States, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions * * * and in formulating such rules of evidence for federal criminal trials *the Court has been guided by consideration of justice not limited to the strict canons of evidentiary revelance.*" [17]

If this Honorable Court is of the opinion that the evidence in question was not obtained in violation of the petitioner's constitutional rights or in violation of the provisions of §605 of Title 47 U. S. C., could there be a more proper place for this Court to state and exercise what it has classified as its inherent right to formulate rules of criminal evidence and to direct the rejection of the evidence in the instant case and in the future all evidence obtained by the means and method employed by the Government in this case.

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[17] Emphasis supplied.

POINT II

The admission into evidence of the accusatory statement made by co-defendant, Gong Len Ying, subsequent to arrest, was serious error prejudicial to petitioner.

The petitioner respectfully submits that serious and prejudicial error was committed by the Trial Court in permitting to be introduced into evidence, over the objection of the petitioner, statements alleged to have been made by the co-defendant Gong in the presence and hearing of the defendant.

The District Attorney elicited from Government witness Detective Monahan, that he had questioned the petitioner and the co-defendant separately and that at that time the petitioner had denied any connection with the co-defendant or any participation in the sale of opium to or with the co-defendant (R. p. 73). There had been previous testimony in the case by Narcotic Agent Gim that the petitioner was asked whether or not he had given or sold a pound of opium to Gong and that he had said no (R. pp. 53, 63).

Detective Monahan then testified:

> "When I got there I put the two of them in one room and I asked the truck driver Gong where he got the opium on January 22nd that he sold to Agent Gim.
>
> The Court: What did he say?" (R. p. 73).

At this point the attorney for the petitioner objected to the question of the Court and the Court replied that it being a statement in the presence and hearing of petitioner it was admissible. The Court proceeded to examine the wit-

ness, Detective Monahan, in detail as appears at pages 74 and 75 of the Record. Counsel then asked for a direction from the Court to the jury to disregard the conversation had with Gong after his arrest, and discussion then took place between the Court and counsel from pages 75 to 80 of the Record. During this discussion in the presence and hearing of the jury the Court expressed the opinion that the failure of a co-defendant on a conspiracy charge to deny the accusatory admission made by another defendant after arrest might be considered by the jury as an admission (R. p. 78). The various statements made by the Court during the discussion in the presence and hearing of the jury could leave the jury with no impression other than that the alleged admission made by Gong in the presence and hearing of the appellant was good and binding evidence against the appellant.

All of this took place on the very first morning of the trial and was constantly referred to and discussed subsequently during the trial, both in and out of the hearing and presence of the jury, by the Court, counsel for the petitioner and the District Attorney.

At page 90 of the Record it appears that Detective Monahan testified that the appellant always denied having any part in the transaction of the sale of the pound of opium in question. Again through Agent Lee, an effort was made to introduce the accusatory statement and admission made by the co-defendant Gong although it appeared affirmatively that the appellant had denied that the opium in question was his (R. p. 102-3).

It becomes apparent how important this point was and how it must have been magnified in the eyes of the trial jury when we realize that at the conclusion of the first

day of the trial and again in the presence and hearing of the jury, the Trial Court, out of a clear sky, when discussing the adjournment for the day, stated:

> "The Court: I can give you the citations on admission by acquiescence" (R. p. 136).

On the morning of the second day of the trial at the opening of Court, the attorney for the petitioner proceeded to move to strike from the evidence the testimony which had been given concerning the admission claimed to have been made by Gong after arrest and offered the Court citations and quotations from various Federal cases. Suddenly, the Court decided that no further argument on the subject should be held in the presence of the jury and deferred argument until later in the case (R. p. 137-39).

Although the District Attorney insisted that he had not offered this evidence as proof of an admission on the part of the petitioner he never lost an opportunity during the trial of trying to get same before the trial jury. At page 217 of the Record it appears that he asked the co-defendant Gong the following question, which he subsequently withdrew when objected to by the petitioner's attorney:

> "Q. Did somebody ask you where you obtained the opium that you gave Agent Gim?"

Again at page 219 he pursued the same question in a different form and the Court again engaged in a lengthy colloquy with counsel for petitioner. Pages 219 to 222 of the Record are concerned with the discussion had in the presence of the jury. Counsel for appellant furnished the Court again with the citations which had previously been given on the morning of the second day of the trial. The

remarks of the Court were highly prejudicial to the appellant, some of the worst being as follows:

> "The Court: I am not talking about before arrest or after arrest; I am talking about whether a case where a defendant did not open his mouth, whether that could be used against him.
>
> Mr. Rosenthal: They all say he does not have to open his mouth after arrest and that no inference can be drawn from that.
>
> The Court: Some say that and some say to the contrary. * * *
>
> The Court: It would be the natural impulse of a man to contradict" (R. p. 222).

At the conclusion of the people's case the attorney for petitioner again moved in respect to the admission of this evidence and further moved for a withdrawal of a juror and a declaration of a mistrial. It is respectfully submitted that a motion for a mistrial should have, at that time, been granted since it should have been crystal clear to the Trial Court that serious prejudicial error had been committed by it, by the admission of the testimony in question and that nothing that would thereafter be done or said by the Trial Court or anyone else could possibly cure it. This point had been stressed to such an extent during the trial by the remarks referred to above by the Court, that the only result that could reasonably be expected was that the trial jury would believe that the failure of the appellant to deny the accusatory statement of Gong was tantamount to an admission by the petitioner of the truthfulness of that statement.

Apparently the District Attorney knew that serious error had been committed and made no effort to justify the

admission of this evidence by citation of any cases in support of the Court's theory. In fact, when the Judge asked him point blank for any supporting citations he attempted to evade and avoid the issue as appears from the following:

> "The Court: You looked it up? You read it? You may read it a different way. What is your best case on it?
>
> Mr. Martin: My position, Judge, is that we don't rely on that part of the testimony.
>
> The Court: I don't care whether you do or not, I am trying the case according to my knowledge of how it should be tried. Why don't you rely on it? Because you think it's wrong? Now, speak up.
>
> Mr. Martin: No, Judge.
>
> The Court: If you introduced it in evidence why was it introduced if it does not amount to anything, what was the idea of it?
>
> Mr. Martin: I did not want to withhold anything from the jury, I merely stated what occurred without asking the jury to draw any inference" (R. p. 254).

It is respectfully submitted that the Court erred in its rulings in respect to the admission and weight of the aforementioned evidence. The following cases all hold that no derogatory inference may be drawn from failure to deny an accusatory statement:

McCarthy v. *U. S.*, decided in the 6th Circuit, 25 Fed. 2nd 298;
Yep v. *U. S.*, 83 Fed. 2nd 41;
Skiskowski v. *U. S.*, 158 Fed. 2nd 177;
People v. *Rutigliano*, 261 N. Y. 103;
U. S. v. *Lo Biondo*, 135 Fed. 2nd 130 (decided in 2nd Circuit 4-22-43).

In *McCarthy* v. *U. S.*, cited and quoted in the *Lo Biondo* case, cited *supra*, the Court said at 299:

> "To draw a derogatory inference from mere silence is to compel the defendant to testify and the customary form of warning should be changed and the respondent should be told 'If you say anything, it will be used against you, if you do not say anything, that will be used against you'."

In *Yep* v. *U. S.*, cited *supra*, the Court at page 43 had this to say in respect to the silence of the defendant when the accusatory statements were made in his presence and hearing:

> "At the time of the conversation between Finnis and Esther Haugh, Yep was under arrest.
>
> When one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he is charged; and statements tending to implicate him made in his presence and hearing by others when he is under arrest or in custody, although not denied by him, are not admissible against him."

The majority opinion of Swan, *Ch.J.*, of the Court of Appeals, held that while the admission into evidence of the accusatory statement made by petitioner's co-defendant after arrest was erroneous (R. p. 164), the error had been cured by the charge of the Court and the petitioner was in no manner prejudiced. Contrast this with the opinion of Swan, *Ch.J.*, then *C.J.*, in *United States* v. *Corrigan, et al.*, 188 F. (2d) 641, in which case although the Court unanimously concluded that the evidence of the guilt as disclosed in the Record was overwhelming, reversal was

required because of the erroneous admission of two exhibits which reflected on Corrigan's integrity. In his opinion Chief Justice Swan, then Circuit Judge, said at page 645:

> "Whether in fact the reports influenced the jury's verdict is, of course unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

The majority opinion of the Appellate Court below offers also an interesting contrast to that by its former Chief Justice Learned Hand in the case of *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 Fed. (2nd) 54. In the instant case the prevailing opinion states:

> "The jury system is premised on the assumption that when the Judge instructs the jury what evidence it may consider it will obey the instruction" (R. p. 413).

Judge Learned Hand in a lengthy decision discussing generally the effect of the jury system on our jurisprudence said, in *Skidmore* v. *Baltimore & Ohio R. Co.*, cited *supra*, at page 64:

> "The theory of the general verdict involves the assumption that the jury fully comprehends the Judge's instruction concerning the applicable substantive legal rules, yet often the Judge must state those rules to the jury with such niceties that many lawyers do not comprehend them and it is impossible that the jury can."[18]

[18] At page 65, footnote 25d, Judge Hand discusses the fact that appellate Courts are prone to hold so-called "procedural" errors harmless although they all too often probably and undoubtedly influence the verdict of the jury.

As pointed out by Judge Frank in the dissenting opinion below, such error could be considered harmless, if at all, only where the Government had proven an extremely strong case, but that in the instant case the evidence and testimony concerning the guilt of petitioner was, to say the least, weak.

This Court in *Kotteakos* v. *United States*, 328 U. S. 750, in discussing so called "harmless" error, said at page 764:

> "And the question is not, were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or may reasonably be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

And again at page 765 this Court said:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The disturbing feature in the instant case is that the majority opinion in the Appellate Court below totally ignores the fact that the Trial Judge in attempting to correct and cure the error complained of unquestionably harmed the petitioner even greater than the original admission of the evidence had done. He misquoted and misstated the evidence and the rule of evidence. In charging on the point in question, which charge was apparently delivered as an afterthought and not as a part of the main charge,

the Trial Judge twice informed the jury that the accusatory statement of the co-defendant was not binding upon the petitioner only if petitioner had denied *before arrest*, the facts contained within the accusatory statement made subsequent to arrest.[19]

Sandwiched in between these incorrect and erroneous statements concerning the facts in the case[20] there is also an equally incorrect charge and statement concerning the Law.[21]

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[19] "The Court: * * * I will charge the jury that *if before the arrest* the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest, in the presence of Monahan and possibly some of the other agents was told or heard Gong saying, 'You gave it to me; you delivered it to me,' then under the circumstances the defendant On Lee could remain silent and his silence would not be regarded as tacit admission that he did so." (R. pp. 360-1). (Emphasis supplied.)

" * * * Now I modify that by this consideration: *if before the arrest* he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him 'I got it from you; you delivered it to me,' in that case I would say that silence did not constitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he already denied it that it was not so if the statement was made in his presence. He has denied it once and that would be sufficient" (R. pp. 361-2).

[20] There is no proof in the Record of a denial by petitioner prior to arrest. The evidence in the Record discloses without question that there was a denial by petitioner *subsequent* to arrest but prior to the accusatory statement of the co-defendant.

[21] " * * * The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth" (R. p. 362).

The only case cited by the Government in its Brief in the Appellate Court below which would seem to hold contra to *United States* v. *Lo Biondo*, *Yep* v. *United States* and the various other cases cited *supra* as authority for the fact that a defendant after arrest is under no compulsion to affirm or deny an accusatory statement made by a co-defendant, and that no inference can be drawn by his failure to do so is the case of *Sparf and Hansen* v. *United States*, 156 U. S. 51. It is not clear from a reading of the opinion in that case as to whether or not the accusatory statement was made subsequent to actual arrest or during the course of an investigation concerning the circumstances of the commission of the crime charged and leading up to the actual arrest.

CONCLUSION

It is respectfully submitted that the questions submitted indicate serious errors concerning novel questions and warrants the exercise of this Court's supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully submitted,

HENRY K. CHAPMAN,
GILBERT S. ROSENTHAL
Attorneys for Petitioner

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 54—October Term, 1951.

(Argued October 3, 1951 Decided November 21, 1951.)

Docket No. 22098

UNITED STATES OF AMERICA,

Appellee,

—v.—

ON LEE,

Appellant.

Before:

SWAN, *Chief Judge*, CLARK and FRANK, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York.

The appellant was convicted of making an illegal sale of opium and of conspiring so to do. Judgment affirmed.

GILBERT S. ROSENTHAL, *Attorney for appellant.*

MYLES J. LANE, *United States Attorney, for appellee;* Stanley D. Robinson and Robert Martin, Assistant United States Attorneys, of counsel.

SWAN, *Chief Judge*:

This appeal brings up for review a judgment of conviction and sentence under a two count indictment. Count one charged the substantive offense of selling one pound of opium in violation of 21 U. S. C. §§ 173 and 174. Count two charged a conspiracy, 18 U. S. C. § 371, to sell opium in violation of sections 2553(a) and 2554(a) of Title 26 as well as the above mentioned sections of Title 21. The appellant was sentenced to three years' imprisonment on each count, the terms to run concurrently, and to a fine of $500 on count one. The appeal challenges the sufficiency of the evidence, and asserts errors in the conduct of the trial and in the charge to the jury.

The indictment named two defendants, the appellant and Gong Len Ying. The latter pleaded guilty and testified for the government at the trial of the appellant. He testified that on January 22, 1950 he agreed to deliver to Benny Gim, an undercover agent of the Bureau of Narcotics, one pound of opium for $550; that Gim gave him the money which he turned over to the appellant, except $70 retained as his share, and that the appellant then got the opium and delivered it to him and he delivered it to Gim. The appelant took the stand in his own defense and denied having had anything to do with, or any knowledge of, the transaction. He admitted having been with Ying on the evening of January 22nd but said their meeting and conversation related only to the purchase of a laundry to whose owner Ying proposed to introduce him. Which story to believe was plainly for the jury. The appellant argues that even accepting Ying's testimony in full, it proved merely a sale by appellant to Ying (not the crime charged)

and a sale by Ying on his own account to Gim.[1] But this interpretation of the transaction was foreclosed by the testimony of Agent Lee, if credited by the jury. Agent Lee testified that he heard the appellant admit in conversation with Chin Poy, a government informer, that the opium sold to Gim belonged to a syndicate of which the appellant was a representative and that he had employed Ying to make the sale. Without detailing more of the testimony, we think it obvious that the evidence as to both counts required submission of the case to the jury.

It is urged that error was committed in admitting Agent Lee's testimony concerning the above mentioned conversation between Chin Poy and the appellant. This conversation took place in appellant's laundry several weeks after his arrest and while he was enlarged on bail. Chin Poy carried a concealed radio transmitter and Agent Lee, who was outside the laundry, overheard the conversation by means of a radio receiving device tuned to Chin Poy's transmitter. The testimony was received over the appellant's objection and it is now contended that disclosure of the overheard conversation is forbidded by the Federal Communications Act, 47 U. S. C. A. § 605.[2] The contention is not sustainable. As the Supreme Court said in *Goldman* v. *United States*, 316 U. S. 129, 133:

> "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation."

There was no "interception" of a communication by wire or radio which is what the statute forbids. The radio de-

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[1] Cf. *United States* v. *Koch*, 2 Cir., 113 F. 2d 982.

[2] This section provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish" the contents of such intercepted message.

vice was merely a mechanical means of eavesdropping, just as the detectaphone was in the *Goldman* case.[3]

As a second string to his bow the appellant contends that even if the use of the radio transmitter by Chin Poy and Agent Lee did not violate section 605, the evidence was inadmissible because it was obtained by a trespass and constituted an unreasonable search and seizure in violation of the Fourth and Fifth Amendments.[4]

In *Gouled* v. *United States*, 255 U. S. 298, a federal employee entered the office of one suspected of crime under the pretext of paying a friendly visit and while there surreptitiously extracted certain papers. This was held to be an unreasonable search and seizure within the meaning of the Fourth Amendment, and the admission of the papers in evidence was held a violation of the Fifth Amendment.

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[3] See Judge L. Hand's comment thereon in *Reitmeister* v. *Reitmeister*, 2 Cir., 162 F. 2d 691, 694.

[4] Appellant cites the dicta of the Supreme Court and this court in the *Goldman* case to support his position. In the *Goldman* case agents had entered the defendant's office and installed a listening device near his telephone. This device failed to work, however. In its place the agents used a detectaphone in an adjoining room which was placed against the walls of defendant's room. The Supreme Court said: "We hold that what was heard by the use of the detectaphone was not made illegal by trespass or unlawful entry * * * Whatever trespass was committed was connected with the installation of the listening apparatus. As respects it, the trespass might be said to be continuing and, if the apparatus had been used it might, with reason, be claimed that the continuing trespass was the concomitant of its use." 316 U. S. 129, 134.

This court had said: "Conspirators who discuss their unlawful scheme must take the risk of being overheard and the risk of having what is overheard used against them, provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception." 118 F. 2d 310, 314.

In commenting upon the *Gouled* case in *Olmstead* v. *United States*, 277 U. S. 438, 463-4, Chief Justice Taft remarked:

> "Gouled v. United States carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record * * * There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.
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> "The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized." (Emphasis in original.)

In the last decade the Supreme Court has expanded the protection of the private citizen against unreasonable interference with his home, his person or his effects, but none of these decisions has directly questioned Chief Justice Taft's analysis. *Dicta*, however, in *Goldman* v. *United States*, 316 U. S. 129, 134, indicate that where officers, by a trespass, entered the accused's office, attached a listening device to his phone and used it successfully, evidence so obtained might be inadmissible because obtained in violation of the Fourth Amendment. One Court of Appeals has expressly gone beyond the holding of the *Olmstead* case. In *Nueslein* v. *United States*, 115 F. 2d 690, police officers entered a suspect's home while conducting an investigation of an automobile accident. When the home-owner appeared he admitted driving the car in ques-

tion. The police were convinced by his appearance that he was intoxicated and they arrested him on a charge of drunken driving. Because the testimony of the police officers was admitted, the conviction of the accused was reversed. The opinion states (at page 692) "The crucial thing 'found' in this 'search' was a declaration of fact by the defendant that has become decidedly incriminating"[5] But we are not disposed to follow the extension adopted by the court in the *Nueslein* case in view of the clear statement in the *Olmstead* case that only the taking of tangible things violates the Fourth Amendment. And this is especially so when we are confronted with the facts in the case at bar. If Agent Lee's testimony is to be excluded it would logically follow, in our opinion, that Chin Poy himself would not be allowed to testify as to the appellant's admissions. No case has been cited to us, and our own researches have found none, which would exclude, because of the Fourth Amendment, testimony of a government agent merely because he concealed from the suspect, when calling at his place of business, that he was such an agent and intended if possible to extract damaging statements from the suspect. Nor do we think that the *Gouled* case can be cited for the proposition that entry by a government agent under such circumstances invariably constitutes a trespass which would render evidence thereby obtained inadmissible. The crucial fact in the *Gouled* case, as Chief Justice Taft pointed out, was that there was both an entry by subterfuge and a taking of a tangible thing. It will be noted that in the *Goldman* and *Nueslein* cases which indicate that the taking of an intangible thing may violate the

[5] See Professor Morgan's comments on illegally obtained evidence, "The Law of Evidence, 1941-1945," 59 Harv. L. Rev. 481, 535-41 (1946).

Fourth Amendment, there was no entry by subterfuge. We do not think the Fourth Amendment stretches so far as to prevent the admission of statements heard by a federal employee in the accused's home or place of business whose only "trespass" is the fact that he conceals his true identity to gain information. It has long been customary for law enforcement agencies to obtain admissible evidence by this method of subterfuge,[6] and until otherwise instructed by the Supreme Court, we shall not interpret the Amendment to require the exclusion of statements so obtained.[7]

In the conversation overheard by Agent Lee on March 30, 1950 the appellant told Chin Poy that the syndicate of which the appellant was the representative could supply opium in the future. The court at once told the jury to disregard this evidence. Shortly thereafter the testimony was repeated and counsel then moved for a mistrial. Apparntly the court never ruled directly on this motion and counsel did not press for a ruling. The prosecutor claims that the testimony was competent because the conspiracy was charged as continuing down to the date of the filing

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[6] "Our general experience shows that much evidence has always been receivable althoug not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received." Chief Justice Taft in *Olmstead* v. *United States*, 277 U. S. 438, 468. See also *Blanchard* v. *United States*, 5 Cir., 40 F. 2d 904, cert. denied 282 U. S. 865; *United States* v. *Wainer*, D. C. Pa., 49 F. 2d 789.

[7] In two recent Supreme Court decisions evidence so gathered appears to have been admitted: *Davis* v. *United States*, 328 U. S. 582; *Frupiano* v. *United States*, 334 U. S. 699.

of the indictment, April 26, 1950; hence the statement made to Chin Poy, although made after the appellant's arrest, was made during the period covered by the indictment and was evidence of the crime charged. Whether this theory would justify admission of the testimony we need not say. Even assuming the evidence was incompetent, we think the court's instruction to disregard it cured the error.

It is strenuously argued that prejudicial error was committed by admitting into evidence testimony that the appellant remained silent when an accusatory statement was made by Ying in the appellant's presence after their arrest. Detective Monahan testified that he first asked the appellant if he had sold the opium or delivered it to Ying and the appellant denied that he had anything to do with it. The detective then asked Ying where he got the opium and Ying replied he got it from the appellant in the hallway of 79 Mott Street on the afternoon of January 22nd; the appellant said nothing. His counsel requested the judge to inform the jury that they should disregard the detective's conversation with Ying. No immediate ruling was made upon this request but a lengthy colloquy was had by court and counsel in the presence of the jury as to whether the appellant's silence could be considered against him as a tacit admission. The court reserved decision and asked counsel to submit authorities. Further discussion between court and counsel occurred later in the trial and at the conclusion of the prosecutor's case counsel for the appellant moved for a mistrial because of the admission of the evidence and the court's comments as to the inference to be drawn from the appellant's silence when the accusatory statement was made. This motion was formally denied. But in charging the jury the court stated that

no admission by Ying after his arrest could bind the appellant. After stating the general rule as to silence in the face of an accusatory statement, he said that the appellant having denied the charge once did not have to deny it again. "He has denied it once and that would be sufficient."

In the light of this court's decision in *United States* v. *Lo Bionda*, 135 F. 2d 130, the admission of evidence as to appellant's silence when faced with Ying's accusation was erroneous, but in that case the jury was told that the accused's silence was a "circumstance which they may consider." In the case at bar the jury was told emphatically that having already denied that he gave the opium to Ying he was not obliged to deny it again when Ying made the charge in his presence. We think this cured any prejudice which might have resulted from the original admission of the evidence.[8] Colloquies as to rules of evidence are not ordinarily regarded by juries as of much concern to them.[9] Any unfavorable impression the jury may have received from the court's remarks during the colloquies, we regard as swept away by the charge.[10] The jury system is premised on the assumption that when the judge instructs the jury what evidence it may consider it will obey the instruction. In exceptional circumstances the prejudice from improperly admitted evidence may be too serious to be cured by a charge to disregard it.[11] But we do not regard the present as such a case.

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[8] *United States* v. *Chiarella*, 2 Cir., 184 F. 2d 903, 910, reversed on other grounds, 341 U. S. 946.

[9] *Frederick* v. *United States*, 9 Cir., 163 F. 2d 536, 548, cert. den. 332 U. S. 775.

[10] *United States* v. *Angelo*, 3 Cir., 153 F. 2d 247, 252; see also *United States* v. *Aaron*, 2 Cir., 190 F. 2d 144, 146.

[11] See *Mora* v. *United States*, 5 Cir., 190 F. 2d 749, 752; *Seaboard Airline R. Co.* v. *Bailey*, 5 Cir., 190 F. 2d 812, 815.

Error is asserted in the court's refusal to give 16 of the defendant's 37 requests to charge. The appellant's main brief merely enumerates the 16 requests but does not point out wherein the charge as given was defective in respect to matters covered by the refused requests. This is not an adequate way to present an attack upon the charge. We have, however, examined the 16 enumerated requests and compared them with the charge as given. It will suffice to say that we perceive no substantial error in refusal of the requests.

Judgment affirmed.

FRANK, *Circuit Judge* (dissenting):

1: Sixty-five years ago, the case of a humble Chinese laundryman led to a decision involving the formulation of one of the most important constitutional principles.[1] Today on Lee's case, as I see it, presents the violation of one of the most cherished constitutional rights, one which contributes substantially to the distinctive flavor of our democracy. This appears from the following facts:

Chin Poy, a paid informer of the Narcotic Bureau, and himself a former drug addict, paid two "friendly" visits to On Lee's four-room combined laundry and dwelling. During these visits, the two men were alone most of the time. Unknown to On Lee, Chin Poy carried, concealed inside his pocket, a 3-inch microphone which picked up everything the two men said, and transmitted it to a receiving set manned by a Narcotic Agent, three or four doors down the block. This government agent, almost a year later, testified at the trial to what he had thus heard.

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[1] *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The two visits, made for the sole purpose of gathering evidence against On Lee to be used in that trial, took place after On Lee's arrest while he was at large on bail.

On Lee was convicted primarily on that Agent's testimony. The informer, Chin Poy, did not testify. But the Agent testified that, by means of the concealed radio, he heard On Lee admit in one of the conversations that he had conspired with one Ying to sell opium, that On Lee represented a narcotics syndicate in the sale, and that he would make a future illegal sale to Chin Poy. Aside from this indirect testimony[2] of the conversation, the only evidence tying On Lee to the offenses was the testimony of Ying, the alleged co-conspirator, who turned "states evidence" at the trial. Government agents testified to various meetings between On Lee and Ying, but the agent with whom Ying negotiated the only illegal sale proved at the trial, had never heard On Lee's name mentioned; and no opium was found on On Lee or among his belongings. He consistently denied, after arrest and on the witness-stand, any connection with dope peddling. His frequent meetings with Ying, On Lee explained by saying that he was discussing the possible purchase of a wet-wash laundry from a business friend of Ying's—a not implausible story. Except for the agent's testimony about On Lee's incriminating conversation with Chin Poy, the jury might well have believed On Lee and acquitted him. In the circumstances, then, a court must look critically at the damaging testimony of the Narcotic Agent to see if it warrants the conviction, for that testimony is the guts of the government's case.

The agent who, at a distance, heard the conversation by means of the hidden microphone (a method seemingly fan-

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[2] How very indirect it was I shall show later.

tastic and smacking rather of lurid gangster movies or the comic strips than of American realities) was engaged, I think, in a search violative of the Fourth Amendment. My colleagues, in rejecting this conclusion, make two arguments: The first runs thus:

> As nothing tangible was taken by any federal officer, no "seizure" occurred; therefore, even if there was an illegal entry on On Lee's premises, the Fourth Amendment was not violated.

That argument means this: A federal officer, without a warrant, unlawfully breaks into a man's house. While there he overhears the house-owner utter a voluntary statement of his own criminal conduct. The officer, according to my colleagues, has not violated the Fourth Amendment, since he has seized nothing, for an oral statement is an intangible, *i.e.*, as one cannot grasp sounds, one cannot seize them. Therefore, at the trial of the house-owner, the officer, over the defendant's objection, must be allowed to testify as to that oral statement.

But Chief Justice Vinson, when a circuit judge, speaking for the Court of Apeals, decided precisely to the contrary in *Neustein* v. *District of Columbia*, 115 F. (2d) 690 (App. D. C.). There officers, entering unlawfully, overheard an incriminating oral statement. "The crucial thing 'found' in this 'search,'" said the court, "was a declaration of fact by the defendant that has become decidedly incriminating. * * * The Fourth and Fifth Amendments relate to different issues, but cases can present facts which make the considerations behind these Amendments overlap. The officers violated the security of the defendant under the Fourth by unlawfully coming into his home and by placing him in custody. * * * But how did the officers find

themselves in position to see and hear the defendant? The officers, in the pursuance of a general investigation, entered the home under no color of right." And so the court ruled that the "officers' testimony regarding the defendant's declaration is inadmissible," adding that, although " * * * the Fourth Amendment was written against the background of the general warrants in England and the writs of assistance in the American colonies," the Amendment "gives a protection wider than these abuses."

My colleagues criticize the *Nueslein* ruling as inconsistent with a statement, in the nature of *dictum*, in *Olmstead v. United States*, 277 U. S. 438. There the Court held that wiretapping did not violate the Amendment, basing its decision in large part on the fact that interception of the phone message involved no entry. The Court said: "There was no entry of the houses or offices of the defendants." This fact the Court noted five times. In passing, the Court also said, "There was no seizure. The evidence was secured by the use of the sense of hearing and that only. Citing *Gouled* v. *United States*, 255 U. S. 298, the Court said that in that case there was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard. The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized." Since the Court found no entry, those remarks were, in every respect, superfluous. Doubtless for that reason, Vinson, *J.*, twelve years later, disregarded those remarks when he wrote Neuslein. Neuslein has been cited by the Supreme

Court in *Harris* v. *United States*, 331 U. S. 145, 153, as a "case in which law enforcement officials have invaded a private dwelling without authority and *seized evidence of crime.*"[3]

And the Neuslein doctrine finds support in an earlier and a later decision: Both *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, and *Zap* v. *United States*, 328 U. S. 624, are based on the assumption that an illegal search occurs whenever government officials unlawfully gain access to a man's books in his home or office, and that it is immaterial that they get their information by reading, copying or photographing instead of by seizing the books and removing them.[3a]

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[3] Emphasis added.

[3a] The *Silverthorne* case refused to allow government agents to raid a defendant's office and "study the papers [obtained in the raid] * * * copy them, and then * * * use the knowledge that it has gained to call upon the owners in a more regular form to produce them." The Court, per Holmes, *J.*, rejected for once and all the argument "that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act." As recently as 1948, the Court dismissed as "a technicality" the seizure without warrant of a check during a legal inspection by government agents. Since the agents "could have taken photographs or made copies of the check and offered them in evidence without producing the originals," the seizure of the check added nothing to the government's case against the defendants and so did not violate the spirit of the Amendment. This was so only because the inspectors "obtained by lawful means access to the documents. * * * They were not respassers. They did not obtain access by force, fraud, or trickery * * * the knowledge they obtained concerning petitioner's conduct under the contract with the Government was lawfully obtained." See also *United States* v. *McCann*, 38 F. (2d) 246, 247 (S. D. N. Y.); *Lagansky* v. *United States*, 31 F. (2d) 846, 850 (C. A. 4); *United States* v. *Mandel*, 17 F. (2d) 270 (D. C. Mass.); *Bowles* v. *Denunzio*, 55 F. Supp. 9 (W. D. Ky.); *Takahashi* v. *United States*, 143 F. (2d) 118 (C. A. 9); *United States* v. *Dziadus*, 289 F. 837, 842 (N. D. W. Va.).

In rejecting the reasoning of Vinson, *J.*, in *Neuslein*, my colleagues ignore the unbroken line of decisions holding that the Fourth Amendment forbids either (a) illegal searches *or* (b) illegal seizures. "The things here forbidden are two—search and seizure," said Miller, *J.*, concurring in *Boyd* v. *United States*, 116 U. S. 616, 641. For this reason, federal courts have generally excluded any kind of evidence obtained as the result of an illegal search and not merely the physical introduction in evidence of things actually seized from the defendant. In *Boyd* v. *United States, supra* (at 627), the Court said that Lord Camden's opinion in *Entick* v. *Carrington*, 19 Howell's St. Trials 1029, was "sufficiently explanatory of what was meant by unreasonable searches and seizures" in the minds of the men who framed the Fourth Amendment. It is notable, therefore, that Lord Camden referred to the removal of papers as but an "aggravation" of the offense in unlawful search cases. "(E)very invasion of private property, be it ever so minute, is a trespass. * * * (Where) private papers are removed and carried away the secret nature of those goods will be an *aggravation of the trespass.*" I think, then, that it goes against 180 years of constitutional history to say that an illegal entry, for the purposes of procuring evidence, is not a violation of the Amendment unless something "tangible" is carried away.

Our highest court has never decided that a "search" is valid merely because made by the eyes or the ears and not the hands. Indeed so to hold would be to disregard the every-day meaning of "search," *i.e.*, the act of seeking. In every-day talk, as of 1789 or now, a man "searches" when he looks or listens. Thus we find references in the Bible to "searching" the Scriptures (John V. 39); in literature to a man "searching" his heart or conscience; in

the law books to "searching" a public record. None of these acts requires a manual rummaging for concealed objects. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property." *Boyd* v. *United States*, 116 U. S. 616, 630.[4]

So, just as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one instance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and the dictaphone both do the work of the end-organs of an individual human searcher—more accurately.[5]

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[4] See also *District of Columbia* v. *Little*, 178 F. (2d) 13, 18 (App. D. C.), aff'd 339 U. S. 1: "Distinction between 'inspection' and 'search' of a home has no basis in semantics, in constitutional history, or in reason. 'Inspection' means to look at, and 'search' means to look for. To say that the people, in requiring the adoption of the Fourth Amendment, meant to restrict invasion of their homes if government officials were looking for something, but not to restrict it if the officials were merely looking, is to ascribe to the electorate of that day and to the several legislatures and the Congress a degree of irrationality not otherwise observable in their dealings with potential tyranny."

[5] A dictaphone, by its very nature, conducts an exploratory search for evidence of a house-owner's guilt. Such exploratory searches for evidence are forbidden, with or without warrant, by the Fourth Amendment. *Marron* v. *United States*, 275 U. S. 192. A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (b) contraband. Speech can be neither. A listening to all talk inside a house has only one purpose—evidence-gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy. The fact that the conversations here took place after On Lee's arrest emphasizes the fact that their only use would be to convict him.

True, some look-searches and listen-searches do not run up against the Fourth Amendment. If an officer stays outside the house (or other precincts protected by the Amendment), he is not engaged in an "unreasonable" search when he looks through a window or listens at a keyhole. His activity is a "search," but not an unconstitutional one—because he has not, without the owner's consent, barged in on the constitutionally protected area. Thus a searchlight-beam focused on a ship's deck is not an unreasonable search (*United States* v. *Lee*, 274 U. S. 559); nor is watching a house from an open field on which the officer is trespassing so long as his trespass does not extend to the house. (*Hester* v. *United States*, 265 U. S. 57); even peeking through a transom is apparently cricket; (*McDonald* v. *United States*, 335 U. S. 451). Similarly government agents may listen to conversations in a defendant's room through a detectaphone attached to their own side of the wall. *Goldman* v. *United States*, 316 U. S. 129. The *Goldman* case (unless as I shall later suggest, it may have been modified) teaches that men must expect official eavesdroppers, flashlight beams, spyglasses, wall-penetrating xrays, and detectaphones—in short, every sort of attempt by officials on the outside to find out what goes on in the inside of one's house.

But the Supreme Court has stood firm in protecting the inviolability of the inside from the physical presence of official outsiders, absent the insider's consent. The Amendment acts as a bar at the doorstep against such uninvited intruders. A man still has the right to be secure in his home, after he has drawn the shades, soundproofed the walls, and insulated the building against xrays. He does not have to keep up a 24-hour watch against official invaders. If the policeman at the window opens it up to come

in for a better look (see *Davis* v. *United States*, 328 U. S. 582, 587, 598-599); if the agents have to break and enter in order to look over the transom of the owner's bedroom (Jackson, concurring in *McDonald* v. *United States*, 335 U. S. 451, 458-459); if the listening device is planted inside the defendant's room rather than on the adjoining wall (*Goldman* v. *United States*, 316 U. S. 134, 134)—in all such instances a violation of the Fourth Amendment occurs. See *Raine* v. *United States*, 299 Fed. 407, 411 (C. A. 9); *Foley* v. *United States*, 64 F. (2d) 14 (C. A. 5); *United States* v. *Phillips*, 34 F. (2d) 495, 499 (N. D. N. Y.).

In any such case, the man is no longer secure in his house: the outsiders have moved in on him. The *Goldman* case drew this distinction prettily—almost as if the Court had anticipated this very case. There the officers, illegally entering a room of Shulman, one of the defendants, planted a "listening apparatus" (a dictaphone) in that room with wires running to the adjacent room which the officers entered lawfully. The dictaphone failed to work. The officers then resorted to a detectaphone which had no wires connecting it with Shulman's room and which all was wholly within the adjacent room. Solely by means of this outside detectaphone, the officers heard defendant's incriminating conversation (carried on in Shulman's room) to which the officers testified. The defendants, said the Court, "contend that the trespass committed in Shulman's office when the listening apparatus was there installed, and what was learned as a result of the trespass, was of some assistance on the following day in locating the receiver of the detectaphone in the adjoining office, and this connection between the trespass and the listening resulted in a violation of the Fourth Amendment. Whatever trespass was committed was connected with the installation of the listening

apparatus [the dictaphone]. As respects it, the trespass might be said to be continuing, and, if the apparatus had been used it might, with reason, be claimed that the connecting trespass was a concomitant of its use."

The *Goldman* case distinction is crucial here: If the government agent, on the outside, unaided by any device smuggled into On Lee's premises, had heard what On Lee said, the agent's conduct would have been unethical (perhaps even unlawful under state law) but not unconstitutional.[6] The microphone, however, was brought into On Lee's establishment without his permission. It was just as if the agent had overheard the conversation after he had sneaked in, when On Lee's back was turned, and had then hidden himself in a closet. All the agent's subsequent evidence-gathering was a result of, a concomitant of, the unlawful invasion. As recognized in *Goldman*, such be-

[6] Although customers may enter a man's place of business at will, it is still as immune from illegal search and seizure as his kitchen or his bedroom. Many of the leading Supreme Court cases on search and seizure have involved places of business. *Gouled* v. *U. S.*, 255 U. S. 298; *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385; *Go Bart Co.* v. *U. S.*, 282 U. S. 344; *U. S.* v. *Lefkowitz*, 285 U. S. 452. Government agents cannot break into a store any more than they can break into a home, or force entry against the owner's will. *U. S.* v. *Rabstein*, 41 F. (2d) 227 (D. N. J.). They can, of course, enter in the same manner as customers and observe what is going on, including criminal acts. *Dillon* v. *U. S.*, 279 F. 639 (C. A. 2). They may seize contraband in plain sight. But they cannot enter the establishment and once inside conduct an unauthorized search or seize articles not in plain sight. Thus officers entering a drugstore to make a routine inspection of records could not sneak into an enclosure marked "Private," and seize illegally stored liquor hidden inside. *In re Lobosco*, 11 F. (2d) 892 (E. D. Pa.). A businessman issues an invitation to the public to come into his establishment, but once inside he can control their activities while on his premises, and he has the right at any time to order them out. If they stay, after he has ordered them to leave, they become, as of that time, trespassers on his property.

havior is altogether different from that of an officer merely listening in an adjoining room which is no part of the defendant's constitutionally protected precincts. Here the agent, in effect, came inside that area, and did so without On Lee's consent.

The situation is no different than if Chin Poy had secretly installed the radio inside the house. On Lee agreed to Chin Poy's presence in his laundry; he did not agree, nor was he given the chance to disagree to what, for all practical purposes, was the presence of someone else altogether. The invading microphone enabled a third person, about whom On Lee knew nothing, to be present at the conversations. It accomplished the same purpose as if, and should therefore be treated as if, the agent had smuggled himself into the room to listen behind closed doors, or as if the agent had been a midget and had been hidden in a bag carried by Chin Poy on to On Lee's premises.

I grant that, as long as the Goldman Doctrine endures, the domain of Fourth-Amendment privacy will be rather restricted, and that it will become more so as new distance-conquering devices, for seeing, hearing and smelling, are invented. But I believe that, under the Amendment, the "sanctity of a man's house and the privacies of life" still remain protected from the uninvited intrusion of physical means by which words within the house are secretly communicated to a person on the outside. A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave,

some inviolate place which is a man's castle.[7] Were my colleagues correct, the Fourth Amendment would be inoperative if a government agent entered a house covered with a "cloak of invisibility"—a garment which ingenuity may soon yield.

This brings me to my colleagues' second argument which runs thus:

> The introduction of the microphone, without On Lee's consent did not render unconstitutional the act of the distant agent in listening to the conversation; for that agent was just like a spy who, gaining entrance by concealing his identity, hears and testifies to an admission made by a criminal; testimony so obtained by a spy (say my colleagues) has never been held inadmissible under the Fourth Amendment.

All else aside, this argument not only wipes out the *Goldman* case distinction but also ignores the distinction between (a) entry with the owner's consent when the consent is procured by deception, and (b) lack of any consent to the entry. This case is of the latter kind. For all prac-

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[7] The famous maxim about an "Englishman's house is his castle," was perhaps a concept quite foreign to common law. Radin, pointing out that the common law recognized no such rule against the processes of the King, says that the true origin of the sanctity-of-a-man's-house idea lies in the Roman law where the maxim was honored in practice as well as theory: No Roman citizen could be dragged from his home by any law enforcement official. Digest, 2, 4, 18. The idea, says Radin, appears first in Gaius' *Commentaries on the Twelve Tables*, and was later picked up by Cicero, *De Doma Sua*, §109. Radin further notes that the idea of the inviolability of the house was also part of German and French law. According to Radin, the lawyers in the colonies were well acquainted with Roman and Continental legal writings. Radin, *Rivalry of Common Law and Civil Law Ideas, in American Colonies*, 423-427 in *Law, A Century of Progress, 1835-1935*.

tical purposes (as I have tried to show), the agent entered On Lee's premises without On Lee's knowledge and therefore minus his consent. That uninvited entry constituted just as much of a constitutional infringement as if the agent had forced his way in. To hold otherwise is to turn the amendment into a sorry joke. It is to say to a police-officer: "Take a hint. Don't bludgeon your way in. Wait till the owner is not looking, and then skulk in. The Constitution forgives a sneak's entry."

This is not at all what the courts have said when they have given a limited sanction to evidence obtained by spies who, by lies, have procured an owner's consent both to enter and to acts done by the spies after entry. Typically, in such a case, the owner, engaged in an illegal enterprise, expressly or tacitly invited prospective customers (or the like) to enter without being required to satisfy any conditions; the invitation was not conditioned on the entrant's not being a government official; the spy gained entry because the owner mistakenly trusted that this seeming customer would not disclose his observations to the government. These were the facts in *Davis* v. *United States*, 328 U. S. 582, and in *Blanchard* v. *United States*, 40 F. (2d) 904 (C. A. 5). *United States* v. *Trupiano*, 334 U. S. 669, relied upon by my colleagues to support their spy analogy, involved an informer who was hired by the defendants as a workman in an illegal still and who reported his observations to the police. The workmen, like the customers, had been invited by the owner onto the premises for a specific reason; and his entrance was not illegal because of the use to which he put his observations.

It is one thing to hold that the Amendment does not safeguard a man from such errors in judging the character of those whom he lets into his house; it is another to hold

that the Amendment does not protect him from officers who get in when he does not know it. We shudder at the nocturnal "knock at the door" by searchers armed with no warrants. How much worse is a secret search by a knockless, sneaky, unknown entrant. In the first case, the citizen has the opportunity to question the searcher's authority, perhaps to dissuade or resist. In the second, he is powerless against an unseen snooper.[7a]

The spy cases are, at best, difficult to reconcile with *Gouled* v. *United States*, 255 U. S. 278, where it was held that a government agent, paying defendant a "friendly visit," conducted an illegal search when he went through defendant's papers without defendant's knowledge. Assuming, however, that *Gouled* has been virtually overruled, the spy cases must, I think, be deemed to go to the very edge of unconstitutionality. No upper court, up to today, has gone further. In *Fraternal Order of Eagles*, 57 F. (2d) 93 (C. A. 3),—overruling in effect *United States* v. *Warner*, 49 F. (2d) 789 (W. D. Pa.) cited by my colleagues—entrance was limited to a special class possessing credentials, and the government spies used stolen credentials which gave them the false appearance of members of that special class. The court held inadmissible the evidence they procured.[8]

[7a] See *United States* v. *Jeffers*, — U. S. — (November 13, 1951) as to officers whose "intrusion was conducted surreptitiously. * * *"

[8] The Court said, in passing, that their entrance constituted a search; "The object of the entry was to discover as much as possible and to use what they could see as a basis for an application for a search warrant. When the agents first entered, they search with their eyes, and saw the very thing that they were looking for. * * * The government may not make an entry by means of false representations, search as fully as possible without arousing suspicion, and later make the fruit of that entry

The practice of broadcasting private inside-the-house conversations through concealed radios is singularly terrifying when one considers how this snide device has already been used in totalitarian lands. Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus.[9] Orwell, depicting the horrors of a future completely regimented society, could think of no more frightening instrument there to be employed than the "telescreen" compulsorily installed in every house. "The telescreen," he writes, "received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper would be picked up by it; moreover, so long as he remained in the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given

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and search the basis of what otherwise might be a legal search and seizure."

See also *People* v. *Dent*, 371 Ill. 33, 19 N. E. (2d) 1020, where the court suppressed evidence obtained by policemen who kicked at defendant's door and were told to "Come In." After entering, they saw illegal number slips on the table, and seized them. The search and seizure were held unconstitutional (under Illinois law) because the policemen had not volunteered their identities and the purpose of their visit before accepting the defendant's invitation to enter.

[9] See Bramstedt, Dictatorship and Political Police (1945) 144:

"Visitors were often led by their friends into the bathroom, a room not easy to tap, and there they exchanged the latest news in whispers. Diplomats and officials met in one of the public parks in order to escape eavesdroppers—mechanical and otherwise. As a result in many houses a tea cosy was put around the telephone receiver as a wise preventative measure. During the war people in Berlin who wanted to talk freely still either disconnected their telephones from the wallplugs or put them under their desks."

moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live, did live, from habit that became instinct, in the assumption that every sound you heard was overheard, and, except in darkness, every movement scrutinized." [10] Such a mechanical horror may soon be the dubious gift of applied science. My colleagues' decision, by legitimizing the use of such a future horror, invites it. [11] I think that the decision is wrong and that the invitation should not be issued.

2. I consider the decision wrong because of the Fourth Amendment. I am not sure it is correct even aside from the Amendment. I have in mind the post-Olmstead doctrine of *McNabb* v. *United States*, 38 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350, *i.e.*, that the federal courts will not receive evidence obtained by federal officers through violation of federal or state laws.[12]

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[10] Orwell, "1984," p. 4.

[11] Such a precision-minded society as Orwell describes is, fortunately, not our only alternative. We can knowingly sacrifice 100% accuracy in crime-detection to freedom. See London Times Lit. Supp., Oct. 12, 1951, p. 642 "if you want to * * * enjoy some personal freedom * * * in the new * * * society * * * you must be prepared to live in the interstices of the society and to put trust in its imprecisions."

[12] I recognize that my suggestion would mean that the *Olmstead* and *Goldman* cases would be in effect overruled, but on non-constitutional grounds. Professor Morgan suggests that this result would be consistent with the *McNabb* holdings. Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 535-541 (1946).

It should be noted that the invasion of On Lee's privacy involved a trespass and was therefore a far more serious wrong than the non-trespassing eavesdropping involved in the *Goldman* case. See A. L. I., Restatement, Torts, §167; Prosser on Torts, §18 (1941).

3. Apart from the radio evidence, I think the conviction should be reversed on still other grounds. Early in the trial, a detective was allowed to repeat the accusatory statement of Ying (On Lee's alleged co-conspirator) made against On Lee after his arrest, when he was present. The judge received this evidence on the theory that, since On Lee had not denied the statement, he had thus admitted by silence what he had not denied. The judge was wrong. In *United States* v. *Lo Biondo*, 135 F. (2d) 130 (C. A. 2), we held that a defendant need not deny any accusations made to his face after his arrest, and that his silence in such circumstances cannot be construed as an admission of his guilt. The trial judge in the instant case later partly realized his mistake, and, by his charge to the jury, sought to correct the misimpression. In a case where the evidence against the defendant was particularly substantial or convincing, I might agree that such an error is harmless, if thus subsequently corrected. But in this case, the evidence was anything but overwhelming, and a misimpression of this sort might easily sway the jury toward conviction.[13] To make matters worse, the judge here, in seeking to correct his error, positively harmed the defendant's case in the jury's eyes: The judge announced that, if the defendant had denied his guilt *before arrest*, he did not have to repeat his denials later after arrest.[14] In the

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[13] "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be an unmitigated fiction." Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U. S. 440, 453. See also *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F. (2d) 54 (C. A. 2).

[14] The full charge on this issue reads: "I will charge the jury that *if before the arrest* the defendant made the statement to Monahan or any other agent that he did not make the sale, that he did not make the delivery, that he did not possess the opium, if he denied all that to Monahan or the other agents, and after the arrest * * * was told or heard Gong saying: 'You gave it to me;

charge, this was the only exception to the general rule of guilt by silence. Since the record contained no evidence that On Lee had denied guilt *before* arrest, the jury might well have believed that On Lee did not come within any exception and must therefore have admitted his guilt by remaining mute.

Such an error should be deemed harmless, if at all, only where the government's case against the defendant is "strong."[15] But here it was not. As already noted, the pivotal evidence was the agent's testimony about conversations he overheard. The following is therefore important: Chin Poy, the informer, was not called by the government and therefore did not himself testify to those conversations. Had the agent attempted to testify to what Chin Poy told him of these conversations, his testimony would have been excluded as hearsay—weak hearsay, at that, since no reason was given for not calling Chin Poy. The

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you delivered it to me,' then under the circumstances the defendant On Lee could remain silent and his silence would not be regarded as tacit admission that he did so.

"The general rule is that when a statement tending to incriminate one accused of committing a crime is made in his presence and hearing and such statement is not denied, contradicted or objected to by him, both the statement and the fact of his failure to deny are admissible in a criminal prosecution against him, as evidence of his acquiescence in its truth.

"Now I modify that by this consideration: if *before the arrest* he denied that he did it and then after the arrest in the presence of the people to whom he denied it, Monahan and the others, if in their presence he kept quiet when Gong told him 'I got it from you; you delivered it to me,' in that case I would say that silence did not constitute and acquiescence cannot be regarded as an admission, because having denied it before, he did not have to deny it again. There was a denial there and he did not have to tell the people to whom he had already denied it that it was not so if the statement was made in his presence. He has denied it once and that is sufficient."

[15] *Kotteakos* v. *United States*, 328 U. S. 750; *Berger* v. *United States*, 275 U. S. 78.

sole basis of receiving the agent's testimony was that he stated he had heard the conversations, *i.e.*, was not merely retelling what Chin Poy had told the agent out of court. Yet, in the course of cross-examination of the agent, it came out that he had to rely on Chin Poy's out-of-court statements about the conversations. Consider these facts: (a) The agent's receiving set, on at least one occasion, was supposed to have been hooked up with a recording device in a nearby truck which could have made a record that could have been played to the jury. But the agent testified that he had made no such record because "the recorder was not working that evening." (b) He also testified that the kind of radio-device he utilized often failed to work properly because of noisy surroundings or transmitted unintelligible noises. (c) He further testified that he did not take notes of all the conversations while they were going on. (d) Only an hour or so later, did he make notes and memoranda concerning what he had heard. And the memo was made after comparing his notes with those of Chin Poy, so that the agent's memo was, at best, a collaborative product. (e) To make matters far worse, the agent did not use his notes and memoranda to refresh or prompt his recollection, although he deliberately tried to give the appearance of doing so. For, during his direct testimony, he kept referring to a written statement. On cross, however, he confessed that this statement was not his own—since his own notes and memos, he said, had been "destroyed" or "filed away." The paper he used to refresh his recollection in testifying was a written statement made by Chin Poy of his recollection of the conversations. So that, in order to testify, the agent had to use out-of-court statements of Chin Poy, a man never seen or heard by the jury and never subjected to cross-examination. Surely a case resting on the agent's testimony is not "strong."